

The Regulation Of Religious Dress Of Teachers In State Schools: Unnecessary Intrusion Or Healthy Separation Of Religion And The State?

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Abstract

After essentially remaining a non-issue for many years, serious questions and litigation have begun to emerge over whether teachers in state funded schools in such Nations as Australia, Malaysia, New Zealand, and the United States can wear distinctly religious dress to school. Not unexpectedly, these controversies have reached mixed results educators in some countries have allowed teachers to wear religious clothing to schools while others have placed a complete ban on such dress.

In light of the nascent legal controversies on point, this presentation, which examines the status of religious garb in public schools as one more aspect of educators' lives that is subject to increasing state regulation, is divided into three substantive sections. In order to set the context, the first section reviews briefly relevant international documents on religious freedom as a fundamental right. The second section reviews the constitutional provisions and legal controversies that have arisen primarily in Malaysia and the United States while also examining controversies that have surfaced Australia and New Zealand. Aware of the need to address the situation wherever it occurs, the final part paper offers policy recommendations for educators who face the controversial topic of whether educators should be permitted to wear distinctly religious garb in public schools. The paper rounds out with a brief conclusion.

Introduction

Educational and political leaders in nations ranging from Australia to New Zealand to Malaysia to the United States and throughout Europe have recently had to confront a growing number of situations in which teachers have sought to wear religious garb to school regardless of the impact that their doing so might have on children in their classes.¹ In light of this emerging issue, this paper examines the issue of dress codes for teachers in two similar yet distinct nations, Malaysia and the United States. The first two sections of the paper examine the constitutional situation in both counties in some detail because even though the constitutions of Malaysia and the United States are similar insofar as both guarantee religious freedom, the former is more prescriptive than its American counterpart. The final section of the manuscript offers recommendations that are applicable for educational leaders in these two nations and beyond to such places as Australia and New Zealand.

Malaysia

Malaysia exercises strict control over the way in which teachers dress to school. Conflicting views arises as to whether by doing so, the state has infringed the constitutional right of teachers to freedom of religion and expression – an unnecessary intrusion – violation of the fundamental liberty to practices one's own individual belief and observances. On the other hand, others believed that there should be a healthy separation of religion and the state.

Religious Freedom as a Constitutional Right

The Federation of Malaysia, which consists of thirteen states and three federal territories, is a Muslim nation, albeit a modern and secular one. Pursuant to Article 4(1), the Federal Constitution (FC) is the supreme law in Malaysia.² This section adds that any law passed after 'Merdeka' Day, the date when Malaysia became independent, 31 August 1957, which is inconsistent with the FC is void.

The FC provides a certain degree of religious freedom among its multi-ethnic population. To this end, the supremacy of the FC in Article 4 (1) affords all the right to profess and practice their religious beliefs in Malaysia's complex multi-ethnic and multi-religious society. Nonetheless, Article 3 of the FC defines the religion of the Federation as follows:

- (1) Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.³

A plain reading of the language in Article 3(1) of the FC stipulates that persons of other religions are free to practice and observe their personal beliefs in peace and harmony. Hence, the fundamental liberty of freedom of religion enshrined in Article 11 of the FC is not in affected by Article 3 of the FC. The provision also reflects the sensitivity of the framers of the FC towards the country's multi-racial and multi-religious populace. The language of Article 3 of the FC "accurately reflects the compromise reached between the Malay Rulers, the Alliance coalition parties representing the major races of Malaya and the British Government."⁴ However, those who are not Muslims cannot propagate their religious doctrines or beliefs.

In the equality clause of Article 8 of the FC, not unlike the American equal protection clause, all citizens are equal before the law and entitled to the equal protection of the law. In addition, the article states that there shall not be any discrimination against citizens based on religion, race, descent, place of birth or gender except where it is expressly authorized by the FC;⁵ recognizes the right of religious groups to establish and maintain institutions for the education of children in their own religions;⁶ prohibits persons from being required to receive instruction in or to take part in ceremonies or acts of worship other than those of their own religions.⁷ However, minors, defined as those who are under eighteen years of age, do not have a constitutional right to choose their own religion since parents have the right to determine the religion of their children while protecting their interests and well-being.⁸

Article 11 of the FC seeks to define and guarantee the constitutional right to freedom of religion of all individuals in a complex multi-ethnic and multi-religious society as follows:

1. Every person has the right to profess and practice his religion and, subject to clause (4), to propagate it.
2. No person shall be compelled to pay any tax the proceeds of which are specifically allocated in whole or in part for the purposes of a religion other than his own
3. Every religious group has the right:
 - (a) to manage its own religious affairs;
 - (b) to establish and maintain institutions for religious or charitable purposes; and
 - (c) to acquire and own property and hold and administer it in accordance with law.
4. State law and in respect of the Federal Territories of Kuala Lumpur and Labuan, federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

5. This article does not authorise any act contrary to any general law relating to public order, public health or morality.

The other provisions in the FC that relate to freedom of religion are Articles 12(1)-(3). Article 12(1) prohibits any form of discrimination based on the ground of religion. In addition, Article 12(2) allows religious groups to establish and maintain institutions for the education of children according to their own religion. Further, Article 12(3) prohibits individuals from being required to receive instruction or take part in a ceremony or act of worship other than that of one's own religion. –

The continuous process of 'Islamization' which began in the 1970s and the political need to advocate a pro-Islamic state amidst a secular constitution is a limitation. The provisions governing freedom of religion in the FC in Malaysia differ significantly from internationally accepted standards in two distinctive respects. At the same time, the FC not only permits different states to enact law that restricts the propagation of religious doctrine among those who are Muslims⁹ but also allows the Federal and state governments to establish, maintain or assist in the establishment and maintenance of Islamic institutions while providing instruction about Islam. Additionally, Malaysian states have the constitutional power to prohibit the propagation of a religion other than Islam to Muslims.¹⁰ In this way, and in a manner very different from the United States, Malaysia not only endorses the religion of the majority since Islam has long been identified as part of the Malay persona but also acknowledges the powerful affiliation between race and religion.

Unnecessary Intrusion

In seeking to interpret Article 3 of the FC, freedom of religion seems to extend beyond the scope of rituals and ceremonies provided that religions can be practiced in peace and harmony in the country. The state's attempt to regulate teacher's wearing of religious attire to school is an unnecessary intrusion as it was inconsistent with the FC. Given the position of the religion of Islam in the FC, regulations of religious dress by the state seem to ignore the religion of Islam. This also applies to teachers who profess other faiths and attempt to wear their respective religious attire to school. Besides being an unnecessary intrusion on the constitutional guarantee to freedom of religion, any regulations to control religious dress by the state is considered void in nature. The regulation of religious dress by teachers in Malaysian state schools seems to be a breach of the FC, in particular, as it could not be said as falling within the exceptions allowed by Article 11 with regards to general laws regarding public peace, public health, or morality. In this respect, the regulation is null and void.

Under Article 132 of the Federal Constitution of Malaysia, public services among other services also incorporate the education service. The Education Service Commission appoints, confirm, emplace on the permanent or pensionable establishment, promote, transfer and exercise disciplinary control over members of the education service.

The Supreme Court of Malaysia reiterated the fundamental right of religious freedom in the controversial case of *Teoh Eng Huat*¹¹ The Court held that infants do not have the right to choose their own religion without the consent of their parents or guardians. This decision is crucial in defusing the potential religious exploitation of children in the future, a dangerous political issue in Malaysia. The Court thus maintained that the right to freedom of religion as encapsulated in the FC is not an absolute, fundamental constitutional right. Moreover, other limitations are embedded in the FC, such as the recognition that the constitutional guarantee is lost when an act or conduct in pursuance of religious beliefs conflicts with general law concerning public order, public health or morality.

Dress Code of Public Civil Servants

Besides the Public Officers (Conduct and Discipline) General Orders 1980, public school teachers, being civil servants, are expected to abide by the regulations and administrative circulars issued by the government from time to time. An example is, on 18 February 1985, where the government issued Service Circular No. 2 of 1985 related to dress code for civil servants. Paragraph 2.2.1 stated that women officers were prohibited from wearing jeans, slacks, shorts and any dress which covered the face during office hours. Interestingly, the paragraph allows government servants to wear during work, the national dress and even the appropriate dress of the respective communities.

There are no specific regulations relating to the dress code of teachers. However, there is a teacher's code of ethics that addressed the issue of dress code in a general manner but is only persuasive in nature. Overall, teachers observe and abide by the code of ethics. There is little dispute over the issue of regulations related to teachers' dress code. The centralized bureaucratized control over education by the federal government, in particular the Ministry of Education, ensures that teachers comply with the various regulations.

A Healthy Separation of Religion and the State

The Supreme Court of Malaysia's decision in *Hjh Halimatussaadiah bte Hj Kamaruddin v Public Services Commission, Malaysia & Anor*¹² offers an important insight into the judicial interpretation of the principle of separation of religion and the state. It served as an invaluable guide pertaining to the regulation of religious dress by teachers in state schools, even though there has yet to be a case taken by the government against teachers. The facts of the case were straightforward. A female clerk in one of the state's legal adviser's office persisted in wearing the *purdah*, a piece of cloth that concealed the entire face of a woman except the eyes, to the office despite the advice of her employer.

This contravened a government circular which prohibited female civil servants from wearing attire covering the face during office hours. The disciplinary board decided that proceedings should be taken against her with a view to her dismissal and informed the Public Services Commission (PSC) of its decision. The PSC requested the clerk to show cause as to why she should not be dismissed. The clerk replied by giving reasons for wearing the religious attire and quoted verses from the Quran. The PSC dismissed the clerk from service. The clerk challenged the validity of her dismissal. The High Court dismissed her action. She appealed to the Supreme Court. Among some of the grounds of her appeal were: - (a) she has a constitutional right to profess and practice her religion and this has been infringed; and (b) she has an obligation to wear the *purdah* to avoid slander as Surah 24 of the Quran stated that a Muslim woman must always cover her face, except the eyes. She argued that the wearing of the *purdah* is a well-known Muslim habit and a way of life.

The Supreme Court dismissed her appeal. Among the other grounds of the judgment, the court opined that the prohibition against the wearing of the attire covering the face by female civil officers did not affect the constitutional right to practice her religion. The wearing of the *purdah* had nothing to do with the constitutional right to profess and practice the Muslim religion. The court further held that the interpretation of Surah 24 was misconceived.

Generally, the state exercised strict control over the wearing of religious dress to school, in particular, the *purdah*. *Halimatussaadiah* is significant decision since it has provided a more detail insight into the intrusion of the state with respect to the regulation of religious dress by public civil servants. The direction taken by the court in *Halimatussaadiah* is interesting as it exerts an effect on the wearing of religious dress by teachers. It has wide ranging implications despite the fact that cases involving teachers have yet to arise.

The principle laid down in *Halimatussaadiah* with respect to religious dress as a practice that is encouraged in one's own religion has far reaching implications to teachers who profess the Buddhist, Christianity, Hindu and other religion besides Islam. It indicated that the authority would not allow teachers from various faiths to wear their own religious garb to school despite the constitutional provisions that encourages freedom of religion.

The judicial approach adopted by the court in *Halimatussaadiah* is relevant and is applicable to public school teachers should a case arise in the field of education in the near future. However, the prohibition of the wearing of the *purdah* represents only aspect of religious dress. On the other hand, teachers, specifically Muslim women are allowed to wear a scarf (*tudung*) that covers the hair.

In another case, *Meor Atiqulrahman Ishak & Ors v. Fatimah Sihi & Ors*,¹³ the Federal Court held that the school did not contravene the constitutional provisions on freedom of religion when it prohibited the pupils from wearing the turban to school. It further opined that the Quran did not mention about the wearing of the turban. Thus, a public school teacher who takes a similar action against the government is not likely to succeed following the principle laid down by the court in *Meor Atiqulrahman Ishak*.

United States

The first sixteen words in the First Amendment to the United States Constitution, known as the Establishment and Free Exercise Clauses or religion clauses joint, have created considerable controversy in education since the Supreme Court entered the fray for the first time in 1947 on the merits of a case under the Establishment Clause. According to these sixteen words, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof”¹⁴

While there are two religion clauses, much of the Court’s school-related jurisprudence has essentially blurred the line between the two, treating both as basically one, often relying on what is referred to as its Establishment Clause analysis. Further, appeals to history to determine the original intent of the Establishment Clause fail to provide clear answers, largely because close ties between religion and government began during the colonial period.

Rather than engage in a lengthy discussion of the different approaches to the Establishment Clause, it should be sufficient to note that two major camps emerged at the Supreme Court and elsewhere in the judiciary: separationists and accommodationists. On the one hand are the separationist supporters of the Jeffersonian¹⁵ metaphor that calls for maintaining a “wall of separation” between church and state, language that does not appear in the constitution; this is the perspective most often associated with the Supreme Court over the past sixty years. On the other hand, accommodationists maintain that the government is not prohibited from having some interaction with religion. Even so, over the past sixty years, the Supreme Court has generally adopted a position that has prevented religious instruction in public schools,¹⁶ state- sponsored prayer¹⁷ or prayer and Bible reading¹⁸ at the start of or in class, and prayer at public school graduations¹⁹ and sporting events.²⁰ The Supreme Court has yet to address a case involving teacher religious dress in public schools on the merits.²¹

Litigation on Teacher Dress

Many older cases in the United States dealt with the issue of whether teachers in public schools could wear distinctive religious garb. The disputes often arose over whether Roman Catholic nuns could wear their habits while teaching in public schools.²² In an early case, the Supreme Court of Pennsylvania affirmed the authority of a local school board to hire Catholic nuns as teachers and to permit them to teach in their habits.²³ Shortly thereafter, the state legislature enacted a statute specifically designed to prevent teachers from wearing dress or insignia indicating membership in religious orders while at work. In deferring to legislative authority, the same court also upheld the law that banned nuns from teaching in their habits.²⁴

The Supreme Court of Oregon, in a case involving a teacher who became a Sikh and wore white clothes and a white turban while teaching, decided that she was subject to a state legislative ban on religious dress while performing her teaching duties.²⁵ In dicta the court recognized that such a prohibition would not have applied to incidental elements such as a cross or Star of David or to ethnic or cultural dress.

Two other cases reached mixed results. The Supreme Court of Mississippi ruled that school officials could not dismiss a teacher who was a member of the African Hebrew Israelites out of Ethiopia faith for insubordination when she wore a religious head wrap to school.²⁶ Yet, the Third Circuit, relying on the statute discussed two paragraphs earlier, rejected the claim of a female Muslim teacher in Pennsylvania who adhered to the religious conviction that she should, when in public, cover her entire body except face and hands.²⁷

It appears that whether educators can wear religious symbolism depends largely on their obviousness and size. The federal trial court in Connecticut granted a school board’s motion for summary judgment in a dispute where officials directed a substitute teacher either to cover a t-shirt with the message “Jesus 2000” on it or to go home and change into other clothes.²⁸ The court was of the opinion that administrators did not violate the teacher’s First Amendment rights to the free exercise of religion or free speech. On the other hand, a federal trial court in Pennsylvania granted an instructional assistant’s motion for a preliminary injunction after she was suspended for refusing to remove or conceal a small cross that she regularly wore on a necklace, as required by her school board’s religious affiliations policy.²⁹ In granting the assistant’s motion, the court agreed that the policy violated the Free Exercise Clause since its being directed only at religious exercise and symbolic expression made it impermissibly content and viewpoint based.

Recommendations

Dress codes, especially those relating to religious garb by teachers can create tension by pitting conflicting interests against one another. On the one hand is the right of educators to express themselves through their clothing. On the other hand is the duty of administrators to establish non-religious environment in government schools may require them to impose reasonable limits on teacher expressive activities, including how they dress at work.

As educational leaders grapple with setting the appropriate balance between their duty to regulate teacher dress and the right of staff members to express their religious values, the following points should be helpful in framing dress code and uniform policies. Before acting, educators should consider the following:

1. Education leaders and their lawyers must start from the premise that while religious freedom is a fundamental right, it is equally as important to balance its place in public or state-funded schools. Thus, even where one religion has a sizeable majority, such as Christianity in the United States or Islam in Malaysia, educators must keep the rights of minorities in mind and not subject them to conditions that limit or inhibit their rights to religious freedom.
2. Input from teachers and their unions should be sought in developing policies because their support is crucial.
3. Educational leaders should develop clear, concise policies carefully defining the rule when dealing with dress codes relating to religious garb. Rules must be drawn as narrowly as possible to avoid restricting the religious rights of teachers.
4. Dress code policies, especially those relating to religious clothing, should be aligned with other board policies, such as codes of conduct, in order to ensure consistency in their application.
5. Policies should include a range of possible sanctions for first, second and repeat offenders. For instance, a first offense might be to remove the item of clothing while a second might necessitate a letter of reprimand in a teacher's file. Ultimately, sanctions might include suspension and or dismissal for teachers who are unwilling to cooperate.
6. Policies should include effective and well-publicized procedures by which teachers can resolve complaints and raise challenges to policies.
7. Policies must ensure that educational leaders, acting in conjunction with their lawyers, take prompt administrative action to address and resolve complaints in a timely manner.
8. Policies should be included in faculty handbooks so that educators are aware of their rights and responsibilities.
9. Policies should be reviewed annually, typically during breaks between school years, never during or immediately after controversies. Placing this time between a controversy and change affords educators better perspectives. The value in reviewing policies regularly is that, in the event of litigation, such evidence can go a long way in convincing courts that educators are doing the best that they can to be up-to-date in maintaining safe, orderly schools while safeguarding the religious rights of students.

Conclusion

Issues related to freedom of religion and the right of teachers to wear religious garb to school based on observance and practice can be highly emotive and divisive. Educational leaders and their lawyers tread a difficult path as they seek to reduce the tension between ensuring the right of teachers to wear religious garb and their duty to create a secular environment in which staff members do not unduly influence the attitudes of students. Thus, religious garb policies for teachers are likely to continue to generate litigation about the how rights and duties of administration and staff must be carefully and sensitively balanced.

Keywords: dress codes; employment; regulation; freedom of religion; teacher rights.

Endnotes

- 1 See, e.g., *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986):
The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers ... demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models.
- 2 This Constitution is the supreme law of the Federation and any law passed after 'independence day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.'
- 3 Federal Constitution, Article 3 inextricably showed the identification of religion with race with the political primacy of the Malay people. See Poh-Ling Tan, "Paying the Price for Religious Freedom – A Non-Muslim Perspective" in Hickling, H R and Min Aun Wu (ed), *Public Law in Contemporary Malaysia* (1999) 135-148, Kuala Lumpur: Longman Publications.
- 4 Tommy Thomas, "Is Malaysia an Islamic state?" (2005) *The Malaysian Bar - Article on Constitutional Law*, <http://www.malaysianbar.org.my/content/view/2066/27/.html> at 9 Sept. 2007.
- 5 FC, Article 8.
- 6 FC, Article 12(2).
- 7 FC, Article 12(3).
- 8 FC, Article 12(4).
- 9 In Malaysia, proselytizing to Muslims by non-Muslims is banned. The Syariah(Muslim) court has jurisdiction to decide whether a person is Muslim. The court also deals with apostasy or renunciation of Islam. See generally, the decision of the Federal Court in *Lina Joy lwn Majlis Agama Islam Wilayah Persekutuan dan lain-lain* [2007] 4 MLJ 585.
- 10 FC, Article 11 (4).
- 11 See *Teoh Eng Huat v. Kadhi of Pasir Mas, Kelantan & Majlis Ugama Islam dan Adat Istiadat Melayu, Kelantan* [1986] 2 MLJ 228, [1990] 2 MLJ 306. For a discussion of this case, see Andre James Harding, *Law, Government and the Constitution in Malaysia* (1996) Kuala Lumpur/The Hague: Malayan Law Journal/Kluwer Law International at 204.
- 12 1994] 3 MLJ 61.
- 13 [2006] 4 CLJ 1.
- 14 Since the First Amendment explicitly prohibits only Congress from making laws establishing religion the Court applied the First Amendment to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating convictions for violating a Connecticut statute against the solicitation of money for allegedly religious, charitable, or philanthropic causes without state approval).
- 15 The metaphor of the "wall of separation" comes from Thomas Jefferson's letter of January 1, 1802 to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 WRITINGS OF THOMAS JEFFERSON 281 (Andrew A., ed. 1903). Jefferson wrote:
Believing with you that religion is a matter which lies solely between man and his God ... I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.
- 16 *People of State of Illinois ex rel. McCollum v. Board of Educ. of Sch. Dist. No. 71, Champaign County*, 333 U.S. 203 (1948).
- 17 *Engel v. Vitale*, 370 U.S. 421 (1962).
- 18 *School Dist. of Abington Township v. Schempp and Murray v. Curlett*, 374 U.S. 203 (1963).
- 19 *Lee v. Weisman*, 505 U.S. 577 (1992).
- 20 *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).
- 21 See note 24 *infra* and accompany text.
- 22 In a related matter, at least one court affirmed that the fact that nuns simply turned their earnings over to their religious superiors was not a justification for barring them from serving as public school teachers. See *Gerhardt v. Heid*, 267 N.W. 127 (N.D. 1936).
- 23 *Hysong v. School Dist. of Gallitzin Borough*, 30 A. 482 (Pa. 1894). See also *Rawlings v. Butler*, 290 S.W.2d 801 (Ky. 1956).
- 24 *Commonwealth v. Herr*, 78 A. 68 (Pa.1910). See also *O'Connor v. Hendrick*, 77 N.E. 612 (N.Y. 1906); *Zellers v. Huff*, 236 P.2d 949 (N.M. 1951).
- 25 *Cooper v. Eugene Sch. Dist. No. 4J*, 723 P.2d 298 (Or.1986), *appeal dismissed*, 480 U.S. 942 (1987).
- 26 *Mississippi Employment Securities Comm'n v. McGlothlin*, 556 So. 2d 324 (Miss.1990), *cert. denied*, 498 U.S. 879 (1990).
- 27 *United States v. Board of Educ. for Sch. Dist. of Philadelphia*, 911 F.2d 882 (3d Cir. 1990).
- 28 *Downing v. West Haven Bd. of Educ.*, 162 F. Supp.2d 19 (D. Conn. 2001).
- 29 *Nichol v. ARIN Intermediate Unit 28*, 268 F. Supp.2d 536 (W.D. Pa. 2003).